No. (1)

Supreme Court, U.S.
FILED

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In The

# Supreme Court of the United States

October Term, 1993

PAUL DAVIES,

*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA,

*Respondent.*

*Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In a criminal case, does the jury instruction that "your only interest is to seek the truth from the evidence in the case" misstate the government's burden under *In Re Winship*, 397 U.S. 358 (1970), especially when the defendant admits that the "truth" is that he committed the criminal act, and defends on the basis of entrapment?

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No.

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# Supreme Court of the United States

October Term, 1993

PAUL DAVIES,

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*Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## PETITION FOR WRIT OF CERTIORARI

## OPINIONS BELOW

The United States Court of Appeals for the Eleventh Circuit affirmed Paul Davies' conviction in a per curiam order without a written decision on November 23, 1993, Case No. 92-5033, *United States v. Davies*, 9 F.3d 1559 (11th Cir. 1993) (App. A, 1a). Rehearing was denied without comment on January 28, 1994 (App. B, 3a).

## STATEMENT OF JURISDICTION

This Court's jurisdiction to review a final order of the United States Court of Appeals for the Eleventh Circuit, affirming a conviction from the United States District Court, Southern District of Florida, is invoked pursuant to 28 U.S.C. § 1254(1).

Following a jury verdict of guilty, Paul Davies was sentenced and a judgment of conviction was entered on October 23, 1992. Davies timely filed a notice of appeal on October 30, 1992. The Eleventh Circuit Court of Appeals per curiam affirmed the conviction on November 23, 1993. Based on supplemental authority, Petitioner filed a timely petition for rehearing in the Court of Appeals on December 6, 1993, which was denied by order entered January 28, 1994. This Petition for Writ of Certiorari is timely filed within 90 days of that order.

## CONSTITUTIONAL PROVISION INVOLVED

**Fifth Amendment, United States Constitution:**

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

## STATEMENT OF THE CASE

### A. Procedural History

Paul Davies was charged by indictment with one count of receiving in interstate commerce two videotapes depicting minors engaged in sexually explicit conduct, in violation of 18 U.S.C. §§ 2252(a)(2) and 2252(b). At the time of his arrest, he immediately admitted having ordered and received the videotapes, which were shipped by the government in an undercover sting operation, but he pled not guilty and raised the affirmative defense of entrapment.

At the three-day jury trial, at which Davies testified, defense counsel moved for judgment of acquittal at the close of the government's case, and again after the close of the evidence, on the ground that the evidence proved entrapment as a matter of law, as stated in *Jacobson v. United States,* 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992). The motions were denied, but the jury was instructed on the law of entrapment.

The trial judge rejected the petitioner's proposed entrapment instruction, and the petitioner's proposed "duty to deliberate" instruction (Federal Judicial Center No. 10; App. C, 4a), but, over a defense objection, instructed the jury according to the Eleventh Circuit Pattern Instructions (*see* Eleventh Circuit Basic Instructions No. 11—Duty to Deliberate; App. D. 5a). The jury found Davies guilty.

At sentencing, United States District Judge Kenneth Ryskamp applied various downward adjustments requested by the defense, and imposed a sentence of two months home confinement, three years probation, and 400 hours community service. Execution of the sentence was stayed pending appeal.

The government initially appealed the sentence, but dismissed its appeal prior to briefing. Davies appealed the conviction, challenging the sufficiency of the evidence and the validity of two jury instructions. The Eleventh Circuit per curiam affirmed on November 23, 1993, without oral argument. Davies' timely petition for panel rehearing based on supplemental authority was denied on January 28, 1994.

**B. Statement of the Facts**

The factual events are undisputed. Paul Davies, a thirty-eight year-old Miami, Florida firefighter and paramedic, an Eagle Scout with no prior arrests or convictions, was randomly solicited by United States Customs officials in an undercover operation which sought to identify and prosecute consumers of illegal child pornography. Approximately two years after the first government contact, after repeated mail solicitations by the government, Davies ordered and received two illegal videotapes in a controlled delivery, leading to his arrest and conviction. Davies defended on the ground of entrapment, arguing government inducement and the total absence of any independent evidence that he was predisposed to commit the crime of child pornography prior to the first government contact.

The government undercover operation was the product of a 1987 plea agreement with the owners of a Miami mail-order distributor of adult pornographic videotapes, known as National Motion Picture Corporation (NMPC). The government utilized the 5700-person NMPC mailing list in an effort to identify some 50-60 unidentified persons who NMPC said had requested child pornography at some time in the past. Paul Davies' name was on the long list of 5700, because he had previously ordered adult videotapes from NMPC.

Customs Agent David Rich testified that "[o]ur job was to

identify those [50-60] people and then to investigate them." Agent Rich candidly admitted that the NMPC records failed to implicate Paul Davies, among the 5700 names, as a seeker of child pornography:

> Q. Now, when [NMPC] told you that they had 50 or 60 people, did you have any way of figuring out which of these 5700 people —
>
> A. No, sir, I didn't.
>
> * * *
>
> Q. You don't have the faintest idea who the 50 or 60 are?
>
> A. No, sir.

(R3-87-88).

The trial testimony revealed a carefully orchestrated government plan to develop and distribute false solicitations for child pornography, as well as to duplicate and distribute the pornographic tapes. Agent Rich worked for two months to devise a letter for all 5700 persons on the NMPC list, as an insert in an NMPC mailing in October, 1989. He fabricated a name, "Artiste Internationale," and produced a flier ostensibly from Belgium. He carefully crafted the flier with "code words" to convey a foreign, exotic flavor, since child pornography is often produced and distributed outside the United States.

Two months later, Davies responded to the flier with a letter asking for a catalog of adult materials, and also expressing a fantasy:

> Dear sirs,
>
> Please send a catalog of your full line of *adult* XXX movies and magazines. I am especially interested in young teenage boys and girls with lots of dripping cum shots.

(R3-45-46) (emphasis supplied).

To serve those who responded to the flier by requesting a catalog, Agent Rich and two female agents repeatedly viewed 15-20 child pornography videotapes in order to write explicit vignettes for the "Artiste Internationale" catalog. Davies received the catalog, saw other government-penned "coded" advertisements for child pornography in Florida Swing Moderns Magazine, and in July, 1991, received targeted direct mail solicitations from the "Stuart Billingsley" company, a government-created distributor of child pornography videotapes ("Operation Tradewinds"). An October, 1991 order from Davies to Stuart Billingsley ultimately led to the controlled delivery of two child pornography tapes in February, 1992. They were seized, unopened, minutes after their delivery, at the time of Davies' arrest. Davies testified that he had *never* ordered, seen, or owned any child pornography outside of that offered and provided by the government. No evidence to the contrary was offered by the government.

The facts of this case are undisputed. The legal error presented as a basis for certiorari review is the validity of a critical jury instruction which confused "truth" with the real issue: Did the government prove Davies' independent prior predisposition beyond a reasonable doubt?

## REASONS FOR GRANTING THE WRIT

**THE ELEVENTH CIRCUIT PATTERN INSTRUCTION THAT A JURY'S "ONLY INTEREST IS TO SEEK THE TRUTH FROM THE EVIDENCE IN THE CASE" CONFLICTS WITH *IN RE WINSHIP*, 397 U.S. 358 (1970), AND PRESENTS AN IMPORTANT AND UNANSWERED "REASONABLE DOUBT" QUESTION SUBJECT TO THIS COURT'S SUPERVISORY POWER.**

### A. Truth and Its Consequences Upon Reasonable Doubt

The trial court gave standard instructions on reasonable doubt. But its final substantive instruction to the jury in this case was the Eleventh Circuit "Duty to Deliberate" instruction, Pattern Instruction No. 11 (App. D. 5a), which concludes:

> Remember that in a very real way you are judges, judges of the facts. *Your only interest is to seek the truth* from the evidence in the case.

(emphasis supplied).[1] That instruction was challenged at trial. The Defendant requested the Federal Judicial Center's "Duty to Deliberate" instruction which substitutes reasonable doubt for truth:

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1. The Annotations and Comments to the Pattern Instruction state that it was approved in *United States v. Dunbar*, 590 F.2d 1340 (5th Cir. 1979). *Dunbar* did not consider the "truth" issue, because the version of the instruction in that case did not ask for truth:

> But remember, you are judges. You are not partisans for either side here, and your only duty in this case is to render an honest verdict as you see it regardless of where it falls. . . .

*Id.* at 1344.

> In a very real way you are judges, judges of the facts. *Your only interest is to determine whether the government has proved the defendant guilty beyond a reasonable doubt.*

(Federal Judicial Center - Pattern Criminal Jury Instructions, 1987 - Jury's Duty to Deliberate No. 10; App. C, 4a) (emphasis supplied). The 1988 Commentary to the Federal Judicial Center instruction states that "[t]he committee's language is a modification of the language suggested in the commentary to Standard 15-4.4(a) of the American Bar Association's Standards for Criminal Justice (Trial by Jury) (2d ed. 1978)." The illustrative instruction contained in the ABA Commentary states "Your sole interest is to ascertain the truth from the evidence in the case." *Id.* at n.2, *citing* Instruction 8.11 of *Jury Instructions and Forms for Federal Criminal Cases,* 27 F.R.D. 39, 97-98 (1961). The Federal Judicial Center modification thus removed the reference to "truth," and replaced it with the requirement for proof beyond a reasonable doubt. That *is* the jury's "only interest."

Comparing the two, the trial judge below recognized the problem with the Eleventh Circuit's Pattern "seek the truth" instruction, but overruled the objection saying, "You got a good point, but I am going to stick with it." (R5-399). This Petition seeks invocation of the Court's certiorari and supervisory power to answer the important and unanswered question of whether the Federal Judicial Center's instruction is the proper one under *In re Winship,* 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), and in light of *Victor v. Nebraska,* __, S. Ct. __, 62 LW 4179 (1994). Other circuits continue to use "truth" despite the Federal Judicial Center's rejection of that statement.[2]

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2. In addition to the Eleventh Circuit, the Pattern Jury Instructions of the Fifth Circuit tell juries to "seek the truth." *See* 1990 Pattern Jury Instructions

(Cont'd)

The issue in this case pierces the placard—"We who labor here seek only truth" — to focus on the role of the *jury* in that endeavor. This Court has characterized a trial as a "truth-determining process," and stated, in general terms:

> "The basic purpose of a trial is the determination of truth," *Tehan v. United States, ex rel. Shott,* 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed.2d 453 (1966), and it is the jury to whom we have entrusted the responsibility for making this determination in serious criminal cases.

*Brown v. Louisiana,* 447 U.S. 320, 334, 100 S. Ct. 2214, 2223 (1980). That language from a case reviewing a criminal conviction by a non-unanimous six-person jury, does not address the duty-to-deliberate charge which governs a jury's function in a criminal case.

The "truth" may be that a person committed a crime, but a conviction requires evidentiary proof of guilt beyond a reasonable doubt. Examining the evidence in light of the government's reasonable doubt burden is the jury's job; ascertaining the objective "truth" is not.[3] Thus, contrary to the instruction given by

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(Cont'd)

(Criminal) Prepared by Committee on Pattern Jury Instructions District Judges Association, Fifth Circuit, 1990 Edition, No. 1.25 Duty to Deliberate. *See also,* Model Criminal Jury Instructions for the District Courts of the Eighth Circuit Prepared by Committee on Model Criminal Jury Instructions within the Eighth Circuit, 1992 Edition, No. 10.02 Duty to Deliberate—"Allen" Charge. *See also,* footnote 4, *infra.*

3. The distinction may be difficult to accept. *See United States v. Goodlow,* 597 F.2d 159 (9th Cir.), *cert. denied sub nom Wallace v. United States,* 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280 (1979), in which then Circuit Judge Kennedy wrote:

(Cont'd)

the trial court, the only interest a jury can have in a criminal case is to determine if the government has carried its burden of proving guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). "Truth" is not the touchstone:

> Mr. Justice Frankfurter stated that [i]t is the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of due 'process.'

397 U.S. at 362. A criminal defendant has a Fifth Amendment constitutional due process right to demand that standard of evidentiary proof of all relevant facts, whatever the "truth" about the crime.

**B. The Truth/Entrapment Entanglement**

This case presents the best vehicle for review of the

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(Cont'd)

> It is a disturbing indictment of our system of justice that an attorney can argue to the court that it is error to instruct the jury to seek the truth. Perhaps both the substance of the argument and the fact that the attorney chooses to make it to the court indicates his agreement with a statement of Socrates that "in the law courts nobody cares a rap for the truth. . . ." Plato, Phaedrus, in Collected Diologues 272d (E. Hamilton ed. 1963). We, who take a grander view of our process, reject the suggestion, and move now to the next case.

While the grander view of justice is that our system convicts only when the truth is that a defendant is guilty, a more realistic view is that some convicted persons are truly not guilty, and sometimes the truly guilty are acquitted.

challenged instruction. The problem with "truth" is magnified in an entrapment case, where a defendant must admit the "truth" of his commission of the criminal act. However, "guilt" can only be the result of the government's proof beyond a reasonable doubt of a defendant's independent predisposition to commit a criminal act, prior to the first government contact. *Jacobson v. United States,* 112 S. Ct. 1535, 1540 (1992).

The undisputed truth is that Paul Davies ordered tapes depicting minors engaged in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a)(2) and (b). In view of that undisputed evidence, the "seek the truth" jury instruction obscured the jury's real role, which is to hold the government to its burden of proof of proving prior predisposition beyond a reasonable doubt. Where the essential elements of a crime are admitted and the dispositive factual issue to be determined by the jury is predisposition/ entrapment, a "seek the truth" instruction is an especially "unruly term" which confuses "a task that can be of great difficulty even when instructions are altogether clear." *Victor v. Nebraska,* 62 LW at 4185 (Kennedy, J., concurring).

The difference in the two instructions in this case—the one given, and the one proposed and denied—is not simply academic. *Winship* did not exclude "predisposition" as a fact which must necessarily be proved beyond a reasonable doubt in an entrapment case. The "seek the truth" instruction, however, poses "a reasonable likelihood that the jury understood the instruction to allow conviction based on proof insufficient to meet the *Winship* standard." *Victor* at 4180. The "truth" that Davies ordered and received the tapes obscured whether the government proved his prior predisposition beyond a reasonable doubt.

## CONCLUSION

The validity and constitutionality of the pattern "truth" instruction presents a conflict with *Winship* and an important but unanswered question of federal law: important because it goes to the heart of a jury's role in a criminal case, and unanswered because apparently, until now, no defendant has properly preserved the issue for appellate review.[4] For those reasons, certiorari should be granted.

Respectfully submitted,

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and

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4. Perhaps because truth sounds like a good thing, it is typically not objected to, and thus not preserved for appellate review. In cases in which the "truth" instruction was not objected-to at trial, but was raised for the first time on appeal, courts have rejected claims that the instruction was plain error. *See, e.g., United States v. Gray*, 958 F.2d 9 (1st Cir. 1992); *United States v. Winn*, 948 F.2d 145, 159 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 1599 (1992); *United States v. Lynch*, 477 F.2d 924, 925 (6th Cir.) (no contemporaneous objection to truth instruction in *Allen* charge), *cert. denied*, 414 U.S. 848, 94 S. Ct. 135, 38 L. Ed. 2d 96 (1973). It is not clear whether the defendant in *United States v. Goodlow*, 597 F.2d 159 (9th Cir.), *cert. denied sub nom Wallace v. United States*, 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280 (1979), *see supra* at n. 3, objected to the "truth" instruction prior to raising it unsuccessfully before the Ninth Circuit.

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**APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AFFIRMING CONVICTION FILED NOVEMBER 23, 1993**

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-5033
Non-Argument Calendar

D. C. Docket No. 92-277-CR-RYSKAMP

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PAUL DAVIES,

Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Florida

(November 23, 1993)

Before TJOFLAT, Chief Judge, KRAVITCH, and CARNES, Circuit Judges.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.

*Appendix A*

Entered: November 23, 1993
For the Court: Miguel J. Cortez, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 3/24/94

## APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING REHEARING FILED JANUARY 28, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-5033

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PAUL DAVIES,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

BEFORE: TJOFLAT, Chief Judge, KRAVITCH, and CARNES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing filed by appellant, Paul Davies, is denied.

ENTERED FOR THE COURT:
s/ Illegible
UNITED STATES CHIEF CIRCUIT JUDGE

## APPENDIX C — DEFENDANT'S PROPOSED "DUTY TO DELIBERATE" INSTRUCTION

GENERAL CRIMINAL INSTRUCTIONS

Federal Judicial Center No. 10. Jury's Duty to Deliberate

It is your duty, as jurors, to talk with one another and to deliberate in the jury room. You should try to reach an agreement if you can. Each of you must decide the case for yourself, but only after consideration of the evidence with the other members of the jury. While this is going on, do not hesitate to reexamine your own opinions and change your mind if you are convinced that you are wrong. But do not give up your honest beliefs solely because the others think differently, or merely to get the case over with. In a very real way you are judges, judges of the facts. Your only interest is to determine whether the government has proved the defendant guilty beyond a reasonable doubt.

## APPENDIX D — "DUTY TO DELIBERATE" INSTRUCTIONS GIVEN BY THE DISTRICT COURT

It is your duty as jurors to discuss the case with one another in an effort to reach agreement, if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury.

While you are discussing the case, do not hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong, but do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember that in a very real way you are judges, judges of the facts. Your only interest is to seek the truth from the evidence in the case.

(Trial Transcript pp. 465-466)